No. 10,014

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS, as joint tenants,
Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,
Appellee.

APPELLEE'S BRIEF.

LOEB AND LOEB,
610 Pacific Mutual Building, Los Angeles 14,
Attorneys for Appellee.

MILTON H. SCHWARTZ,
HERMAN F. SELVIN,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

INDEX TO APPENDIX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Statutes.

Textbooks.

No. 10,014

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS, as joint tenants,

Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,

Appellee.

APPELLEE'S BRIEF.

General Considerations as to Appellee's Position and the Questions Involved in This Appeal.

Appellants devote the major portion of pages 9, 10 and 11 of their brief to what they term "questions involved" and set forth twelve of such questions. It seems to us that the entire matter can be summed up substantially as follows:

> In an action upon a judgment rendered by a German court, does the evidence support the findings of the trial court to the effect that as a matter of German law there was no effective assignment of the judgment from the judgment creditor to the plaintiffs' predecessor in interest?

In order to prevail at the trial plaintiffs had to prove a complete chain of title to the German judgment running from May Film[1] to themselves. According to appellants [Brief p. 3] the links in this chain were May Film to Joe May; Joe May to the Bank For Foreign Commerce; Bank For Foreign Commerce to Fritz Mandl; Fritz Mandl (through Union Bank & Trust Co. of Los Angeles) to plaintiffs.[2] If the chain broke at any point, plaintiffs' proof of title in themselves failed and their cause was lost. Of course, they are in no better position here as appellants.

As will presently appear, the evidence upon which the trial court based its findings shows that the chain broke in at least two places: the first, there was never any effective transfer from May Film to Joe May; the second, there was never any effective transfer from the Bank For Foreign Commerce to Fritz Mandl, even assuming that May had title and therefore effectively transferred to the Bank. Additionally, as will also presently appear, the very judgment in favor of May Film upon which appellants rely, rendered in an action to which appellee Universal was a party, conclusively adjudicated that Joe May was not the owner of the claim upon which the judgment was based. Since appellants claim by direct transfers stemming from Joe May, they are bound by that adjudication and as a matter of German law, as will be shown, they are estopped from contending as against Universal (appellee) that Joe May was the owner.

---

[1]For brevity the German judgment creditor will be referred to herein as May Film instead of by its corporate name.

[2]No attack is made upon the assignment by Mandl, except that he had nothing to assign.

We shall remind the court that the law of a foreign country is a question of fact to be answered from the evidence in the record and that when any finding of the foreign law is supported by the evidence it is just as conclusive as any other supported finding of fact. The trial court found that under German law the chain of title was broken in the two spots referred to above. If the finding as to either break is supported it is enough, since one break is as good as many. Further, it will be shown that all of the findings are fully supported by the evidence.

After the judgment upon which this action was based became final, Bank For Foreign Commerce brought a declaratory relief suit against May Film which was represented by its liquidator. Universal was not a party to that suit and so far as the evidence discloses had no notice or knowledge of it. The judgment or decree in that suit declared that the judgment previously obtained against Universal was the personal property of Joe May and that his assignment to Bank For Foreign Commerce was legally valid. This is clearly set forth in the trial court's Finding IV [R. p. 36][3], in the case at bar.

Upon ample evidence of the German law, given by experts, the trial court found as a fact that the decree in the declaratory relief suit (to which Universal was not a party) was in no way binding upon Universal and was not evidence "of any of the facts or issues determined or purported to be determined therein." Thus, with no actual assignment from May Film to Joe May

---

[3]In the interest of uniformity, we shall follow appellants' plan of referring to the judgment sued on as "the judgment," the declaratory relief judgment as "the decree" and the Transcript of Record by the initial R.

and with no comfort to be drawn from the declaratory relief decree, appellants' claim to title to the judgment failed at the very outset.

Appellants, by their contentions in this appeal, have placed themselves in the middle of a dilemma from which there is no escape. As will clearly appear in our more detailed discussion and can be gathered from appellants' brief, most of the "evidence" of the substantive facts upon which plaintiffs at the trial relied to establish the allegations of their complaint relating to the assignment of the May Film judgment consisted of *recitals in the record* of the declaratory relief suit. Therefore one of two things is true: either those recitals are not binding upon appellee Universal because the latter was not a party to that suit and consequently furnish no evidence against Universal of the facts recited; *or,* the evidence of the experts as to the legal effect of the facts recited, assuming them to be facts, conclusively supports the trial court's findings as to the German law.

It will be seen that we never conceded that the recital of these matters in the judgment roll constituted any evidence of the facts but, since the roll was admitted in evidence, we drew from the experts their opinions on the assumption, but without conceding, that the facts were as recited.

Before we proceed to a more detailed discussion, with quotations from the testimony and citations of authority, it might serve a useful purpose to sum up in outline form the general considerations just advanced and which, despite the heavy fog cast about them in appellants' brief, determined the outcome of the case in the trial court,

and must, we respectfully submit, determine its outcome here.

I. Appellants failed to prove that they own the German judgment.
   1. The judgment itself adjudicates conclusively that May Film is its owner.
   2. There was no effective transfer from May Film to Joe May.
      a. There could therefore be no effective transfer from Joe May to Bank For Foreign Commerce.
   3. There was no effective transfer from Bank For Foreign Commerce to Fritz Mandl.
      a. The assignment from Fritz Mandle to Union Bank & Trust Co. of Los Angeles and from the latter to plaintiffs therefore never became effective.

II. The declaratory relief decree was not effective to vest title in Joe May as against appellee Universal.
   1. Universal was not a party to the suit and the decree was therefore in no way binding upon it or even evidence against it.

III. Appellants are in a dilemma from which there is no escape.
   1. Since they must depend for their proof of facts upon mere recitals in a record to which appellee Universal was not a party, they cannot escape from the additional fact that under the German law the recited facts were insufficient to effect a transfer of title.

ARGUMENT.

1. The Trial Court's Findings Nos. III and V Are Fully Supported by the Evidence.

Finding No. III, in part, is as follows:

> "Under and by virtue of the law of the German Reich said judgment [upon which this action is founded] and the claim on which it is based, were and at all times since have remained, the property of May Film A. G.; and in the German Reich and by virtue of the law of that country said judgment at all times since its rendition has been and is now enforceable against the judgment debtor, or its successor, only by May Film A. G., the judgment creditor." [R. p. 36.]

Finding No. V is as follows:

> "Under and by virtue of the law of the German Reich said Joe May (the asserted predecessor in interest of plaintiffs herein) did not acquire or succeed to the ownership of any part of the judgment rendered in the action herein above in Finding III referred to, or to any part of the claim upon which said judgment was based. In that connection the Court finds that the facts, as the result of which said acquisition or succession is claimed to have resulted, were and are insufficient to have the effect, under the law of the German Reich, of transferring to or vesting in said Joe May any part of said judgment or of the claim upon which it is based." [R. p. 37.]

We shall undertake to reproduce, as briefly as possible, the evidence which shows that title to the judgment never passed from May Film to Joe May and, if it did so pass, was never transferred by Bank For Foreign Commerce

(an alleged holder of the title after May) to Fritz Mandl who was the immediate assignor, through a Los Angeles bank, of appellants.

The very judgment rendered by the German court, upon which this action is founded adjudicated as follows:

> "II) The Plaintiff is entitled to sue upon the claim. For its contention that this is not the case, defendant relies upon the testimony of the witness, Joe May, according to which he is alleged to have discussed and agreed, as stockholder, with the other stockholder, Aussenberg, that besides other assets the claim here sued for belonged to him, while the suit was to be continued by the Corporation May has, as he has stated, taken upon himself a deficit liability towards the liquidation creditors of an amount of 40,000 Rm.; he also claims to have paid 45,000 Rm. but states, on the other hand, that he would not be released from his liability even if the result of the present law suit should go into the liquidation assets.—According to this testimony, it must be assumed that the claim was not really 'assigned,' so that it was transferred from the corporation to one of the associates, May, but that the agreement between the associates was that after completion of the liquidation, the asset in question should be transferred to the associate, May, out of the remaining assets. It is supposed to have been especially agreed that the corporation should be authorized to continue the liquidation, and therefore be entitled to the proceeds of the law suit. The Plaintiff is the corporation, represented by the liquidator. Distribution of the assets of the corporation among the associates would be invalid as to him, before the corporation debts were

paid, because the associates are not authorized to divide among themselves the assets of the corporation, without taking care of the debts." [R. pp. 128-129.]

Thus, in the action to which appellee was a party, the German court found May Film to be the owner of the claim and entitled to sue upon it.

Dr. E. O. F. Golm was called at the trial by appellee, as an expert on German law. From 1904, when he began to study law in Germany until 1937 when he came to the United States, Dr. Golm had a varied experience as lawyer, judge and member of the government in Germany. His background is given on pages 310, 311 and 312 of the Transcript of Record.

Dr. Golm gave testimony which furnishes strong support for the trial court's findings III and V. This testimony appears on pages 316 to 328 inclusive, middle of page 333 to 337 inclusive, and pages 454, 455 and 456 of the Record. To save the court as much as possible from the annoyance of turning to the Transcript of Record and also because, as we think, the quotation of certain of the testimony here will have a tendency to clarify the issues, we reproduce the following from the evidence given by Dr. Golm:

"Q. Would an agreement between two stockholders of a company, in which between the two of them they owned all of the stock, with respect to the transfer or disposition of a part of the company's assets to one of the stockholders, have any effect as a transfer of those assets, in German law, without any act of the governing body in the execution of a document of transfer or assignment in pursuance of that

act? A. It would not have any effect in this meaning. It would create certain obligations between the two stockholders, but it would not have any effect binding upon a corporation or binding upon anybody else, as far as a transfer of this property or claim is concerned.

Q. Dr. Golm, for the purpose of expressing an opinion as to the German law I want you to assume certain facts to be true; assume them for the purpose of a question only. Let's assume that about the 10th of May, 1926 an American corporation enters into a contract with a German business corporation, which contract provided by its terms that it was to be governed by the laws of Germany, the contract further provided that in case of any violations of the contract the violating party must pay to the faithful party a contractual penalty of 50,000 marks. Prior to the year 1930 but after the contract was entered into the American corporation violated the contract, under circumstances entitling the German corporation to the contractual penalty of 50,000 marks. That an action was commenced in the Landgericht of Germany against the American corporation for the purpose of recovering and enforcing that contractual penalty of 50,000 marks. That on or about March 4, 1930 the Landgericht rendered a judgment that the German corporation was not entitled to recover the contractual penalty. That shortly after the rendition of that judgment and while proceedings to carry the case on in the Kammergericht were pending, two persons—we will call them, for the sake of our hypothetical question, Joe May and Julius Aussenberg; Joe May being at that time a sole stockholder of the German corporation which is involved in our hypothetical lawsuit—entered into an agreement by which Aussenberg agreed to buy a part of Joe May's stock

in the German corporation and they also agreed, as part of that agreement, that in return for 45,000 marks, contributed to the assets of the corporation by Joe May, certain of the property and assets of the corporation should be assigned to Joe May, and that included in the assets, which were to be so assigned under this agreement, was the claim of the German corporation against the American corporation for the 50,000 marks contractual penalty. Then let us assume that in due course the matter was heard and determined by the Kammergericht, which handed down the judgment on or about July 27, 1932, condemning the American corporation to pay to the German corporation the sum of 50,000 marks with interest in a certain amount. And let us assume that the judgment so handed down by the Kammergericht is the judgment of the Kammergericht which appears in this case as part of Plaintiffs' Exhibit 1, being the judgment in the action by May Film against Universal Pictures. That subsequently proceedings were taken by both parties, in the nature of a petition to the Reichsgericht, to review that judgment, which petition was rejected, so that the judgment of the Kammergericht became final. Assuming those facts to be true, do you have an opinion as to whether or not, under the law of Germany, the person we have referred to as Joe May acquired any interest in or title to the claim of the German corporation against the American corporation?" [R. pp. 316-318, incl.]

Appellants' counsel objected to the question propounded by appellee's counsel, one of the grounds of objection being that a further fact should be included in the question, namely, that "The board of directors, to-wit, the sole director, approved of the transfer." Thereupon, this

fact was added to the question and the witness permitted to answer. His answer follows:

"A. I understand the addition. The first part, assuming the facts given to me to be true, would be an agreement between—if it is permissible I would like to give the names of the two persons, Joe May and Aussenberg—by which agreement Joe May paid.

Q. Yes. A. The intention of this agreement was that he should acquire certain assets belonging to the corporation, and among them the claim in question against Universal. There can be no doubt, according to the German law, that an agreement of such kind could never bring about a transfer of such assets, particularly of this claim, because neither Aussenberg nor Joe May were entitled to dispose of the claim. The claim belonged to another person, *a persona juris,* the Aktiengesellschaft, which is entirely different from the individual stockholder. And, of course, this agreement is not without any value. It has to be interpreted as to the will of the contracting parties. And this interpretation would lead, in this special matter which you wanted me to assume to be true, would lead to the conclusion that the parties intended to say that one of the contracting parties, to-wit, Aussenberg, would no longer be interested in those assets, but that Joe May—

Mr. Blum: Your Honor, I don't want to interrupt—

Mr. Selvin: Then please don't. Let him finish his answer." [R. pp. 321-322.]

"The Witness: Now, as I understand, I should furthermore assume the fact that the governing body consented to this agreement.

Q. By Mr. Selvin: Let me ask you about that.

The Court: He will ask the question, Dr. Golm.

Q. By Mr. Selvin: Let us assume this: In addition to the agreement of the stockholders, assumed in the prior question, that the governing body of the German corporation consisted of only one person, and in our hypothetical question let us call that person Johanna Loewenstein. Let us assume that Johanna Loewenstein knew that there was such an agreement between the two stockholders and that she had no objections to signing an intermediate balance sheet of August 15, 1930, which was after the date of this agreement between the stockholders, and agreed to the contents of the agreement between the two stockholders. And that in this intermediate balance sheet which she signed, and according to this intermediate balance, Joe May paid to the German corporation 45,000 marks, and there was assigned to him, in consideration, the assets, including the lawsuit against Universal Pictures. Assuming those facts, in addition to the facts previously assumed, would there be any difference in your answer? A. There would be a slight difference in the answer. Of course, this question couldn't be answered generally in an affirmative or a negative manner, because the assigning of a balance sheet, an interim balance sheet, as far as I understand, does not replace a real assignment. In order to make this transaction valid the governing body, in this case Mrs. Johanna Loewenstein, would have had to transfer the claim from the May Film Corporation to Joe May. However, if this claim was mentioned as to being transferred to Joe May in the interim balance sheet, and if Johanna Lowenstein as the only member of the governing body, did consent to this balance sheet, then it could be concluded, by means of interpretation also, that notwithstanding and apart from the foregoing agreement she wanted

to assign this claim to Joe May, and this assignment could be considered as valid. In order to answer the question completely I would have to see the balance sheet and the contents of it, because otherwise it couldn't be answered in a very decisive manner.

Q. But would this be true. That until such time as there was what you call a real assignment executed by the governing body of the corporation, would there have been effected, under the German law, any transfer to Joe May of the claim? A. No, it would not. The assignment of the governing body, the only organ of the stockholder company which has the right to dispose of the property, is indispensable for a transfer of a claim to a stockholder.

Q. Would the mere fact that the governing body knew that an agreement for such assignment had been made between the stockholders, and made no objection to it, take the place of a real assignment? A. The knowledge alone would not take the place." [R. pp. 322-324, incl.]

The reference to appellants' oral testimony on the subject appears on page 18 of their brief and has to do with statements made by the witness Heinz Pinner, an attorney in Berlin for Bank For Foreign Commerce. Dr. Pinner prepared the complaint in the declaratory relief suit and handled the case for the bank. [R. pp. 486-487.] The testimony of Pinner to which appellants call attention is as follows:

"A. From the facts I got, from the information I got, and from the complaint, I never had the slightest doubt but what there was a valid assignment. It was one of the best cases I ever had. I was convinced from the first moment that this complaint must be won in the court, because there was a valid assignment as to my opinion." [R. pp. 488-9:]

This witness seems to have based his opinion upon the complaint drawn by himself and information, the nature of which he did not disclose. One suspects that the declaratory relief suit was not very hotly contested. In this connection, the trial judge in the case at bar remarked: "I think counsel refers to a judgment to which Universal Pictures was not a party, which was sort of a friendly suit in which it was determined that Joe May was, in his individual capacity, the owner." [R. p. 319.]

In any event, the evidence offered by plaintiffs as to whether the German judgment was ever assigned to Joe May by May Film or ever became the property of Joe May, simply created a conflict in the evidence upon that subject. The trial court determined the conflict in favor of defendant Universal and carried that determination into the findings. Findings III and V are therefore unassailable.

2. Finding No. IV Is Fully Supported by the Evidence.

Failing to prove any effective assignment to Joe May of the German judgment, appellants at the trial made a vigorous effort (they make a truly desperate one in their brief on this appeal) to bring to their support the declaratory relief suit between Bank For Foreign Commerce and May Film, by its liquidator. In this suit (to which the trial judge in the instant case referred as "a sore of a friendly suit") it was adjudicated that Joe May individually owned the judgment against Universal. The entire proceedings in this case are included in the Transcript of Record as Plaintiffs' Exhibit No. 4, between

pages 217 and 241. The only witness testifying was Miss Johanna Loewenstein who gave her deposition at Hollywood, California. Her testimony appears between pages 235 and 238 of the Record. The German court said: "Proof for the allegation of the complaint has been made by this testimony, so that according to paragraph 256 of the Code of Civil Procedure, the prayer for declaratory relief must be granted." [R. p. 230.]

It should be noted that the purported facts relied upon by appellants in their effort to establish ownership of the judgment in Joe May, for instance those appearing on pages 16 and 17 of their brief, are not proven facts at all; they are simply recitals made by plaintiff in the declaratory relief suit and became no part of the court's decision. Aside from the consideration that appellee was not a party to that suit and is not bound by its decree, matters which appeared there only by way of recital can hardly be raised to the dignity in the instant case of proven facts.

Finding No. IV, which appellants attack, is as follows:

> "On or about February 25, 1935 the Landegericht which was at the time a court of record of the German Reich, rendered a declaratory judgment, in an action in which the Bank For Foreign Commerce (Bank fur Auswartigen Handel A. G.), a German corporation, was plaintiff and May Film A. G. represented by its liquidator was defendant, declaring that the claim asserted in the action hereinabove in Finding III referred to was the personal property of one Joe May and not of May Film A. G. and that therefore, the assignment of said claim to said Bank for Foreign Comerce by said Joe May was legally

valid. Neither Universal Pictures Company, Inc. nor Universal Pictures Corporation was a party to said action of Bank for Foreign Commerce v. May Film A. G., or had or was given any notice or knowledge thereof. Under and by virtue of the law of the German Reich said declaratory judgment was in no way binding or conclusive upon either of the defendants herein, had no effect upon their or either of their rights in respect of the claim referred to in said judgment or in respect of the ownership of said claim, and was and is not evidence as against either of the defendants herein of any of the facts or issues determined or purported to be determined therein." [R. p. 36.]

The testimony of Dr. Golm which supports the finding appears largely between pages 335 and 345, both inclusive, of the Record. We quote here, in the interest of clarity as well as of emphasis, a short excerpt from the testimony:

"Q. Dr. Golm, using the term 'judgment in rem' in the sense of a judgment or decree, by a court, which is conclusive evidence against the entire world of the fact or facts which it determines or adjudicates, is there any such thing as that in the German law? A. I wouldn't say that there was no such thing in the German law, because there might be a judgment concerning the status of a person, such as whether a person is a legitimate child or whether a person is the child of a certain father. That would be binding upon everybody. And if you call that a judgment in rem I would say there is such a thing.

Q. Using the term 'judgment in rem' in the sense in which I have indicated, would a judgment in Germany between two parties, declaring one of them

rather than the other to be the owner of a certain claim, be a judgment in rem? A. There would be no doubt that it could never be a judgment in rem. Never, under no conditions.

Q. The judgment of the Landgericht, which is in evidence here as part of Plaintiff's Exhibit 1, that is the judgment between the Bank for Foreign Commerce and May Film— A. Yes, I know this judgment, because I translated it.

Q. In your opinion is that judgment a judgment in rem, using the term 'judgment in rem' in the sense which I have indicated? A. This judgment is a declaratory judgment which says that a claim, the claim against Universal, is owned by Joe May—or it says, 'Is hereby established that this claim is owned by Joe May,' it is rendered in a lawsuit between the Bank for Foreign Commerce and the May Film A. G., which was represented by its liquidator. It creates law only between the two litigant parties, and nobody else is bound to this establishment. It is a declaratory judgment which has effect only between the two litigant parties.

Q. Does that judgment have any effect, under German law, as in any way affecting or concluding the rights, duties or obligations of the claim respecting that judgment? A. No, it would not. And for my answer refer to the answer to the former question.

Q. Would that judgment in Germany have the effect of precluding or preventing Universal from contesting or challenging the fact of an assignment having been made? A. It would never prevent Universal from doing so.

Q. If I understand your opinion correctly, then, in so far as Universal is concerned, the question of

whether or not there was an effective transfer of the claim from May Film to Joe May is in no way concluded or affected by that judgment? A. This judgment concerns the relationship between the Bank for Foreign Commerce and the May Film A. G., and to that extent it establishes that the claim is owned by Joe May. That is the meaning of this judgment." [R. pp. 337-340, incl.]

Professor Max Radin, of the law school faculty of the University of California, gave expert testimony to the same effect. His direct examination begins on page 367 of the Record and so far as it pertains to the subject under discussison is as follows:

"Q. You are familiar, no doubt, with what in American law we call a judgment in rem? A. I am.

Q. Is there any equivalent or analogy to that in the German law? A. There are judgments dealing with the status of the family, covered by Book 6 of the Code of Civil Procedure of Germany. There are cases involving family status, covered almost wholly in Book 6 of the German Civil Code of Procedure, which are judgments in rem. Although that term is not used in German law to any extent, in so far as the status determined cannot be attacked laterally once it has been determined by the court. There is nothing corresponding to the judgment in rem involving ownership or obligatory transactions.

Q. Are you familiar with the judgment which is part of Plaintiff's Exhibit 3 and which we have referred to here as the declaratory judgment between the Bank for Foreign Commerce and May Film? A. I have read that judgment, the original and the translation.

Q. Using the term 'judgment in rem' as we use it ordinarily in American law, would you say that is a judgment in rem? A. If I may refresh my memory by looking at the last part?

The Court: Yes.

A. No, that is a declaratory judgment and, in my opinion, is not a judgment in rem.

Q. In your opinion, under German law, would that judgment have binding or conclusive force upon anyone not a party or a successor in interest to a party to that action? A. No.

Q. What generally is the effect of German judgments, from the standpoint of the American law which we call *res judicata?* A. They bind the persons who are parties and their privies. They bind no one who is not a party to the action.

Q. Is there, under German law, anything conclusive against one not a party to the action, or not a successor to the party to the action, as to the facts determined in that judgment? A. No. I may say this, since I am speaking as an expert witness all this is qualified by the term, in my opinion." [R. pp. 367, 368, 369.]

When appellants' counsel say (Brief p. 17 and in different language on page 19) that "the oral opinion of the experts for appellees included an *admission* that the declaratory decree established that the claim in question was owned by Joe May," they are being a trifle naive. Both experts, Dr. Golm and Professor Radin, made it quite clear that the declaratory judgment created law only between the two litigant parties and "nobody else is bound by this establishment"; that "German judgments bind the persons who are parties and their privies. They bind no one who is not a party to the action."

Dr. Heinz Pinner, one of *appellants'* witnesses to whom reference has already been made, gave testimony to the same effect as follows:

> "The Court: Then, I take it, your answer is, it is not binding against third persons that are not before the court? A. No. In this case there is no doubt it isn't binding against anybody else but against the May Film, but it is—if I can explain it—evidence of title or proof." [R. p. 501.]

Appellee's position that the declaratory relief decree has no binding effect as against it receives support from another of *appellants'* witnesses, though appellants' counsel in quoting from the Record stop just short of giving us that fact. At the bottom of page 18 and top of page 19 their brief says: "Another of appellants' experts stated in response to a question as to the effect of the declaratory decree that: 'In a German case . . . such judgment would produce more than an assignment.' That such decree would have the effect of 'an assignment which has been confirmed by a court. In a case it would be evidence?" The very next question (omitted from the brief) is:

> "Q. Not conclusive on the third party, but evidence of an assignment?"

and the answer of the expert begins:

> "A. Not conclusive, of course not, but another party would have to bring exact facts," etc. [R. top of page 531.]

Thus it appears that expert witnesses for both appellee and appellants gave evidence on German law which fully supports the trial court's finding No. V. Any tes-

timony in the Record in opposition to the opinion given by the witnesses from whom we have quoted, simply created a conflict in the evidence, a conflict which was resolved by the trial court against plaintiffs; appellants here are in no better position than they were in as plaintiffs at the trial.

3. Finding No. VI Is Fully Supported by the Evidence.

Earlier in this brief, in the section headed, "The Trial Court's Findings Nos. III and V Are Fully Supported By the Evidence," we reproduced a portion of the German court's judgment in the basic action May Film v. Universal, taken from pages 128 and 129 of the Record. This judgment declares that "The plaintiff (May Film) is entitled to sue upon the claim" and that "the claim was not really 'assigned,' so that it was transferred from the corporation to one of the associates, May . . ." This adjudication is conclusive upon appellants and is carried into the trial court's finding No. VI, as follows:

> "As part of its findings of fact made and entered in the action hereinabove in Finding III referred to, the Kammergericht found that the claim asserted in said action by the plaintiff therein had not been transferred to or acquired by Joe May, which said finding, under and by virtue of the law of the German Reich, was and is a conclusive determination of that issue as between Universal Pictures Corporation and its successors on the one hand and May Film A. G. and its successors or claimed successors on the other." [R. pp. 37 and 38.]

Since Joe May made himself a party in fact to that action by financing it [R. p. 230; Brief p .17] he and his successors are conclusively bound by the adjudication in that case. In other words, as between Joe May and his successors on the one hand and Universal on the other, the judgment of the German court (Kammergericht) that the claim against Universal *had not been assigned to May*, is a conclusive and final determination of that issue of fact. That would be the effect of such a judgment rendered in California and, therefore, that is the effect that must be given to a foreign judgment when brought in question here. (*Cal. Code of Civ. Proc.*, Secs. 1915, 1908(2); *Bates v. Berry*, 63 Cal. App. 505, 509; *Dobbins v. Economic Gas Co.*, 182 Cal. 616, 625, *et seq.; Calif. State etc. Bureau v. Brunella,* 14 Cal. App. (2d) 464, 466.) Furthermore, for the reasons given in the cited cases, as well as those indicated in *Williams v. Cooper*, 124 Cal. 666, 669 and similar decisions, the declaratory judgment in the later action to which Universal was not a party could have no effect as against Universal upon the prior judgment.

The first link in the chain upon which appellants must rely to prove their title to the German judgment has failed them. No actual assignment from May Film (the owner of the claim against Universal upon which the basic action was founded) to Joe May was made: the judgment in the basic action conclusively adjudicated that May Film owned and continued to own the claim; the experts on German law established as a fact that the declaratory relief decree had no effect upon the prior judgment and made no change in its ownership by which Universal could be affected.

Since Joe May never acquired the judgment, of course he could not make an effective transfer of it to the Bank For Foreign Commerce or to anybody else. However, since appellants contend that the bank acquired title to the judgment and passed it on to Fritz Mandl either by assignment or by "operation of law," we shall have to examine that contention. This brings us then to finding VII in which the trial court found that Fritz Mandl never acquired the title.

4. Finding No. VII Is Fully Supported by the Evidence.

The finding, which appears on page 38 of the Record, is as follows:

> "Under and by virtue of the law of the German Reich none of the transactions had between or among said Joe May, Bank for Foreign Commerce and one Fritz Mandl had the effect of transferring to or vesting in said Fritz Mandl any part of the judgment hereinabove in Finding III referred to or of the claim upon which it was based, even if at the time of said transactions said Bank for Foreign Commerce acquired or was vested with ownership of said judgment or claim. In that connection the Court finds that the facts, as the result of which it is claimed Fritz Mandl did acquire or succeed to said judgment or claim, did not have the effect, under the law of the German Reich of transferring to or vesting in said Fritz Mandl any part of the right, title or interest of said Bank For Foreign Commerce, if any, in or to said judgment of claim." [R. p. 38.]

Assuming for the sake of the argument, that by some stretch of the imagination it can be said that at some

time or other, by one means or another, the Bank For Foreign Commerce had succeeded to the rights of May Film in the judgment against Universal, then by what means did the Bank pass on its rights to Fritz Mandl? The answer is that it did not pass them on.

Notwithstanding the statement of counsel on page 25 of their brief to the contrary, there was no competent evidence at the trial of an actual assignment from the Bank For Foreign Commerce to Fritz Mandl. The testimony to which counsel refer was obviously admitted by the trial court, over our objection, as preliminary to the introduction of a written assignment or of competent evidence of the contents of an assignment, whether written or oral. No such evidence was ever introduced. The proceedings were as follows, taken from the deposition of Fritz Mandl:

> "Q. As a result of this payment which the bank obtained from you under your guarantee, do you recall that the bank gave you an assignment of a certain claim which they held against Universal Pictures Corporation, New York City, U. S. A.?
>
> Mr. Selvin: We object to that question on the ground that it assumes facts not in evidence, namely, that there was a guarantee, or that there was an assignment; upon the ground that it calls for a conclusion of the witness as to the effect of certain transactions.
>
> The Court: Objection overruled.
>
> Mr. Blum (reading):
>
> A. Yes.
>
> Q. Do you recall about when this was? A. Between 1932 and 1934.

Q. Have you got this document showing the assignment by the bank to you of their claim against Universal Pictures Corporation here? A. No.

Q. Do you know where this document is at the present time? A. No.

Q. Did you instruct the Bank for Foreign Commerce to notify Universal Pictures Corporation, New York, of the assignment? A. No.

Q. Do you know whether the Bank for Foreign Commerce notified Universal Pictures Corporation of New York City of the assignment of their claim to you? A. Yes." [R. pp. 264, 265.]

"Mr. Blum (reading):

Q. And the assignment which was made to you by the Bank for Foreign Commerce at Berlin, of a claim against Universal Pictures Corporation, was made after you had paid your guarantee to the Bank for Foreign Commerce in French francs?

Mr. Selvin: I object to that on the ground that it assumes facts not in evidence, namely, that there was an assignment from the Bank for Foreign Commerce to the witness, and secondly, that there was a guarantee, and further, it calls for a conclusion of the witness.

The Court: Objection overruled.

Mr. Blum (reading):

A. Yes." [R. p. 270.]

Upon this subject of an actual assignment the trial judge in his Memorandum Decision and Minute Order, said:

"The other question is: What rights were acquired in the judgment by Fritz Mandl through the guaranty he gave to the Bank of Foreign Commerce

of a debt of May Film Corporation, as security for which Joe May assigned the judgment in the main action?

"The measure of Mandl's rights is the bank's letter to the defendant, dated February 25, 1936. This letter states Mandl's rights as those of one who has become an assignee by operation of law only. Plaintiffs treated it as such in their complaint. Nowhere in the bank's letter, or in the complaint, is it claimed that the transaction was an actual assignment or an equitable assignment." [R. p. 32.]

The letter to which the court refers was sent by Bank For Foreign Commerce to Universal and is reproduced on pages 295, 296 and 297 of the Record.

No proof of an actual assignment to Mandl was made. It is assumed that Mandl paid the debt to the Bank and the sole question is whether by this act, assuming it occurred, the judgment passed to him by operation of law. The *letter recites* [R. p. 296] that, according to paragraph 774 of the German Civil Code, the guarantor (Fritz Mandl) having satisfied the claim of the creditor the security for the debt passed to him. The rest of what appellants call a "Statement of Events" [R. p. 23] is taken from the *recitals* in the declaratory relief suit. Except for recitals and transcripts of testimony in a suit to which Universal was not a party, and *ex parte* statements in a letter, there was no competent evidence that there ever was a loan to May Film or that Joe May ever assigned anything to the Bank or that Fritz Mandl ever received an assignment. However, if these recitals be taken as establishing the facts, the one additional fact is that under the law of Germany (as will presently appear

from the expert testimony) they were insufficient to effect a transfer of title to Fritz Mandl. Here is another example of the dilemma in which appellants find themselves.

For the purpose of showing that no effective transfer of the basic judgment was ever made to Fritz Mandl, we shall assume that the *ex parte,* non-binding, incompetent recitals actually furnish evidence of the facts to which they relate. Even with this assumption, title to the judgment did not pass to Fritz Mandl for at least two reasons: (1) under the facts as recited there could be no transfer by operation of law, *i. e.,* payment of a debt did not automatically transfer the security to the person paying, according to the opinion of the expert witnesses; and (2) a valid assignment could not have been made without the written permission of the Board of Control of Exchange (Devisenstelle) which, so far as the record discloses, was never obtained. First, then, the expert testimony: Dr. Golm was examined at great length upon this subject, upon both direct and cross-examination. In effect, he gave it as his opinion that under the assumed facts, Fritz Mandl never became the owner of the German judgment. His testimony appears in the Record on pages 342 to 352; 359 to 361; 404, 405; 421 to 426; 440, 441; 464 to 468. It would extend this brief unduly to quote any considerable portion of it, either here or in an appendix. Therefore, we have selected a comparatively brief excerpt which serves to sum up pretty well the general tenor of his opinion.

> "Q. (By Mr. Selvin): With respect to what passes to the paying surety, under those circumstances, is there any difference in the German law between a claim, let us say, which is given to the

principal creditor by way of lien, and a claim which is absolutely assigned to the principal creditor, but as security for the debt? A. There is a very decided difference, as laid down by the Supreme Court in a decision in Volume 89, in Section 774 of the German Civil Code.

. . . . . .

A. This is the decision. It starts on page 193, and the part which I was referring to is on page 195.

The Court: Give us the substance of it.

A. The substance is that Section 774, which deals with a transfer by virtue of law to a paying surety, is not applicable in cases where there was not a security, a lien mortgage or other type of security, but a real assignment. And the decision states—and I may add that that is my opinion. I agree with this decision.—It states that in such case where there is a real assignment given by any kind of a guarantor, surety or debtor, but not a lien or other type of security, there exists only an obligation of the creditors after his satisfaction to reassign this claim or to transfer it to anybody else; but that there is never operation of law taking place, as in case of Section 774 and 401 and 426, which is quoted in 774. So it states that there is only an obligation. To answer Mr. Selvin's question, I would say that in this case, where there was a real assignment of a claim given by Mr. Joe May to the Bank, and the Bank was completely satisfied, the Bank was under the obligation to free this claim and to reassign it either to Joe May or maybe to Fritz Mandl, if the facts are correct, but that there was no operation of law transferring this claim to Mr. Mandl. It is different from the security mentioned in Section 401 and other security and the reassignment.

Q. (By Mr. Selvin): Referring once more to Plaintiffs' Exhibit 5, that part of it which consists of the letter of February 12, 1936, you will find there on the first page quoted what purports to be an assignment from Joe May to the Bank of the claim against Universal. A. They use the word 'abtretung.' The Latin word is 'cessio.' That means an assignment, or in German, 'abtretung.'

Q. What I mean, this letter quotes what the Bank says was such an assignment. Assuming that assignment was executed—and you understand it is my contention that that is no evidence of the fact that it was executed—but assuming that was executed, is or is not that a real assignment, as you have used that phrase in the answer last given? A. Yes, surely, because he says, 'I herewith assign the aforementioned claim based upon the judgment, to its full extent and with every interest or accessory claims, to the Bank for Foreign Commerce.'

The Court: Then, as I gather the substance of your statement relating to this, it is this: That Joe May, having made an actual assignment, as contradistinguished from any assignment by operation of law—A. Yes.

The Court: Then, before Mandl could acquire any right there would have to be a direct assignment from the Bank to him, and not a mere operation by payment of the debt; is that correct? A. That is correct, Your Honor." [R. pp. 352 to 355, incl.]

Professor Radin testified much more briefly but to the same general effect, *i. e.*, that under the circumstances assumed here, a claim would not pass by operation of law to a surety who paid the principal claim. [R. pp. 369 to 371.]

The expert testimony shows, practically without contradiction, that under German law, an assignment *as security* is a real assignment to be distinguished from an assignment as a pledge. [R. pp. 399, 401, 404, 405, 407.] The assignee, in the case of an assignment for security must return the security when the debt is satisfied. However, the security must be re-transferred or re-assigned to the debtor; it does not pass back to him by operation of law. Should a third party (in this case Fritz Mandl) pay the creditor, and be entitled to receive the security, the satisfied creditor must make an assignment in favor of the third party; no transfer by operation of law takes place. [R. pp. 354, 355 and 356.]

It will be remembered that, according to the recital in the letter to Universal [R. p. 296], which, of course, is not evidence of the fact, Joe May made an absolute assignment of the claim and judgment to the Bank For Foreign Commerce.

The German law experts testified that an assignment of the judgment by the Bank For Foreign Commerce, under the facts assumed in this case, would have been invalid without the written permission of the Devisenstelle, the German Board of Control of Exchange. There was no competent evidence that such a permission was ever given for the purported assignment to Fritz Mandl. [See Testimony of Dr. Golm, R. pp. 361 to 365, inclusive; testimony of Dr. Pinner, appellants' witness, R. pp. 501 and 502; testimony of Dr. Gebhardt, appellants' witness, R. p. 539.]

It thus appears that the Bank For Foreign Commerce never made an effective assignment of the judgment to

Fritz Mandl and if an assignment was made it was invalid without the permission of the Devisenstelle.

Having failed to establish that Fritz Mandl obtained title to the German judgment by *operation of law* (which was the only issue on this subject tendered by the amended complaint, R. pp. 6 and 7) appellants try to twist an *equitable assignment* out of the letters or notices sent by the Bank For Foreign Commerce to Universal in New York. (Brief pp. 62, 63 *et seq.*) The attempt goes beyond the issues as has been indicated. Furthermore, if a notice emanating from the Bank is to be treated as an assignment it is one by a German assignor to a German assignee, executed in Germany, relating to a claim founded upon a German contract executed and to be performed in Germany and reduced to a judgment in a German court. The judgment is for a sum of money in German marks and being a judgment of a German court, ordering payment to a German corporation, it was to be performed in Germany. In short, every material incident to the situation is referable to Germany and Germany alone. Manifestly, therefore, the substantive, legal effect of a document such as the one relied on must be decided by the law of Germany. The letter depended on as an assignment, so completely German in all its incidents, cannot be transformed into an American instrument because of the mere fact that it was mailed to a third party in America. Appellants' claim that the California law or New York law applies and that under either law the letter or "notice" was an equitable assignment, is clearly untenable. The legal effect of an assignment is determined by the law of the place of assignment. (*Restatement, Conflict of Laws,* secs. 348, 350; *Fenton v. Edwards, etc.,* 126 Cal.

43, 46-49.) Professor Radin testified that in Germany there is no such thing as an equitable assignment. [R. p. 378.] Dr. Golm testified that the letter or what counsel call the "notice" was not effective, under German law, as a transfer or assignment of a claim to Mandl against Universal. [R. pp. 348 to 352, incl.]

After plaintiffs had failed to vest title to the German judgment in Fritz Mandl by operation of law (under the allegations of the complaint) or by equitable assignment (which was outside the issues and also untenable) and the case had been decided against them, with commendable persistence and fortitude they made a motion for a new trial upon the ground of newly discovered evidence, claiming that an *actual assignment* to Fritz Mandl had been discovered. This motion was heard upon the affidavits referred to in Appellants' Brief, pages 86 and 87, and the counter-affidavit of Herman F. Selvin. [R. pp. 78 to 83, incl.] The trial court denied the motion and we can find nothing in the Brief or the Record to indicate that there was any abuse of discretion on the part of the court. It appears from Mr. Selvin's affidavit that due diligence was not used since the evidence was known at all times to Mandl, the real party in interest or to Lenk, one of plaintiff's witnesses, and could have been learned by counsel by simple inquiry of them. Under such circumstances the motion was properly denied. (*Marshall's etc. Supply v. Cashman* (C. C. A. 10), 111 F. (2d) 140, 142; *Warner Co. v. Orapello* (C. C. A. 3), 72 F. (2d) 373, 374; *Brea v. McGlashan*, 3 Cal. App. (2d) 454, 468; *Harrolson v. Barrett*, 99 Cal. 607, 610-11; *Estate of Cover*, 188 Cal. 133, 149-50.)

It also appears (Brief pp. 87 and 88) that the evidence of the contents of the purported written assignment was oral testimony given by one Erick Lenk, from memory, in an affidavit, the purported assignment itself not having been shown to be lost, destroyed or unavailable. The trial court was justified in viewing this testimony with that suspicion which courts frequently direct at alleged newly discovered evidence. (*Harrolson v. Barrett, supra; Tibbet v. Sue,* 125 Cal. 544, 548.)

The trial court's finding No. VII, declaring that Fritz Mandl never acquired title to the German judgment, is, we submit, amply supported by the evidence. Similarly, we have seen that the trial court is fully supported in its finding No. V that Joe May never succeeded to the ownership of any part of the claim or judgment against Universal and in finding No. IV that the declaratory relief "decree" was in no way binding or conclusive upon Universal or even evidence against it. Indeed, as is declared in finding No. VI, the German judgment upon which the action is founded, conclusively determined that the claim had not been acquired by Joe May.

As we stated at the outset, and undertook to show by the evidence, the chain of title claimed by appellants to run from May Film to themselves, through Joe May, Bank For Foreign Commerce and Fritz Mandl, failed in at least two places, and by reason of those broken links, judgment for defendant was a correct determination of the case.

5. A Short Resume of the Principles of Law and Authorities Applying to the Case.

(a) Under our procedure a plaintiff who sues upon an assigned claim must plead and prove the fact of assignment and it is always open to the debtor to show that no assignment was effected, either because no act of assignment took place or because what is claimed to be an assignment did not have that legal effect. (*Brown v. Curtis,* 128 Cal. 193, 195-6; *Bovard v. Dickenson,* 131 Cal. 162, 164; *Sterling etc. Co. v. Laher Co.,* 116 Cal. App. 100, 101; 6 *C. J. S.* 1184, Sec. 132.)

(b) A foreign judgment will be given the same effect in this state as it has in the country of its rendition. Its effect upon the rights and interests of the parties and their privies, therefore, is governed by the law of the country of rendition. (*Calif. Code of Civil Procedure,* Sec. 1915; *Restatement, Conflict of Laws,* Sec. 450(1); *Cuba R. R. Co. v. Crosby,* 222 U. S. 473, 478-9;[4] *Fox v. Mick,* 20 Cal. App. 599, 602; *Title Ins. etc. Co. v. Cal. Dev. Co.,* 171 Cal. 173, 208; *Chapman v. Chapman,* 48 Kans. 636, 29 Pac. 1071; *Gobin v. Citizens etc. Bank* (Colo.), 20 P. (2d) 1007.)

(c) The validity and effect of an assignment are determined by the law of the place of assignment, which in this case was Germany. The fact that notice of the alleged assignment was given to Universal in New York

---

[4]Please see Appendix for quotation from opinion of Mr. Justice Holmes.

is therefore immaterial and the law of New York can have no bearing on the case. (*Restatement, Conflict of Laws,* Secs. 348, 350; *Fenton v. Edwards & Johnson,* 126 Cal. 43, 46-9; *Pritchard v. Norton,* 106 U. S. 124, 27 L. Ed. 104.)

(d) The law of a foreign country is a fact to be proved as is any other fact. It is not to be proved merely by the introduction in evidence of excerpts from its written laws, but should be proved by its merchants and lawyers. As against the evidence of experts who take into consideration all sources of that law, the bare language of a statute, without the gloss acquired from interpretation, practice and usage, raises no conflict. (*The Asiatic Prince* (C. C. A. 2), 108 Fed. 287, 289;[5] *In re International Mahogany Co.* (C. C. A. 2); 147 Fed. 147; *Badische etc. Fabrik v. Klipstein Co.,* 125 Fed. 543; 4 *Wigmore on Evidence* (3rd Ed.) 546, Sec. 1271; 7 *Wigmore on Evidence* (3rd Ed.) 82, Sec. 1953.[6])

Appellants make a valiant effort to apply American law to the question of the effect of the German declaratory relief decree and quote at length (their Appendix) from *Chapman v. Moore* and *Perkins v. Benquet etc. Co.,* California Supreme Court and District Court of Appeal decisions respectively. Even if it could be said that these decisions apply (which we insist is not so) such applica-

---

[5]Please see Appendix for quotation from opinion of Judge Lacombe.

[6]Please see Appendix for quotation.

tion would be merely to *one link* in the chain of title, the one vesting title in Joe May. There still remains the other broken link, the one by which Fritz Mandl *failed* to acquire title. Furthermore, these two decisions and others of the same kind cited by appellants are to be distinguished from the case at bar on the facts (the facts, for the most part, be it remembered, being non-binding recitals in the declaratory relief case) and the grounds for distinguishing them readily appear when they are read against the analysis of the trial judge in his memorandum decision in the instant case. The pertinent portions of this decision are as follows:

> "What is attempted here is to bind the defendant by a judgment in an action to which it was not a party and which declared Joe May to be the owner of a judgment against it, in contradiction of a prior judgment, on the same issue, in the main action, in which it was a party, and of which Joe May, as assignee pending suit, had notice.
>
> This, in effect, is not merely to give evidentiary value to and to receive the declaratory judgment as a link in a chain of title at the behest of one claiming a superior title against one claiming adversely to the title. But it is, in reality, to give to it binding effect on the defendant, who is challenging the right of one claiming to be its judgment creditor under the judgment of a court in a case to which it was not a party.
>
> This cannot be done under the law." [R. pp. 31, 32.]

6. Appellants' Criticism of the Trial Court's Findings Is Frivolous.

Appellants complain of findings Nos. IV, V and VII. The amended complaint tendered the issues upon which the trial court made the findings of ultimate fact, of which appellants now complain. Furthermore, as is shown under Division No. 5 of this brief, the law of a foreign country is a fact to be proved as in any other fact. By the testimony of the experts it was proved that as a matter of German law the declaratory relief judgment was not binding on Universal and was not evidence against it. These were facts of German law and the trial court so found. Appellants' counsel say (Brief p. 68):

> "The further statement in Finding IV that the decree was 'not evidence against defendants' is a question of *law* and not a question of *fact*."

True, it is a question of German law but it became a proven fact when the experts gave testimony concerning it and when the trial court accepted it as a fact.

Appellants complain that the findings refer to "undefined and undescribed facts as being sufficient to cause a result. The facts are not stated and are left to surmise." It was not necessary for the court to find upon the probative facts from which it deduced the ultimate facts as to the effect of the declaratory relief decree, assignment by operation of law, etc. (*Klein v. Milne*, 198 Cal. 71, 75.)

Findings of foreign law such as those under attack here are not conclusions of law. They are findings of fact. (Cases cited *supra.*) Even as a general proposition of law they are sufficient as findings of fact and are not conclusions of law. (*Hick v. Thomas*, 90 Cal. 289, 296; *Weger v. Rotha*, 138 Cal. App. 109, 113.)

7. Appellants' Brief and the Position of Appellee With Regard Thereto.

The entire structure of appellants' brief, particularly in so far as it claims that the validity of Fritz Mandl's alleged title to the German judgment must be determined by the law of the forum, or of California or of New York, is built upon a false foundation. This becomes immediately apparent upon an examination of the citations given us on pages 63 and 64 of the brief.

At the bottom of page 63 it is said:

> "The question of whether the 'notice' conferred upon Mandl the ownership of the judgment so as to permit him or his successors as such owner to prosecute an action against Universal *must be determined by the law of the forum.*" (Italics not ours.)

In support of this statement, *Jos. Dixon Crucible Co. v. Paul*, 167 Fed. 784, is cited and quoted from. The quotation (page 64) tells us that "the question raised by the defendant whether or not the assignment vests such title in him as to authorize the suit as brought, and to entitle him to judgment in that Court must be determined by the laws of Florida." (The forum.) As far as appellants'

counsel are concerned, the quotation is a half-truth. They neglect to tell us that the only question in the case was whether the assignee of a chose in action could sue in his own name or was required to sue in the name of his assignor. This was, of course, a procedural question and was decided by the law of the forum. Counsel next cite (Brief p. 64) *Pritchard v. Norton,* 106 U. S. 124, and state that it is "to same effect." Again, they neglect to tell us that the case does *not* hold that the effect or validity of an assignment is to be determined by the law of the forum, but only whether the assignee can maintain the suit in his own name. In fact the decision (p. 130) supports our position rather than that of appellants, of which fact, of course, counsel do not inform us. We take from the opinion the following language (p. 130):

> "Whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and determinable by the law of the forum; but whether the foreign assignment on which the plaintiff claims is valid at all, or whether it is valid against the defendant, goes to the merits and must be decided by the law in which the case has its legal seat."

Williston on Contracts, cited by counsel on page 64 of their brief, says:

> "'* * * Whether an assignee can maintain an action in his own name is held to be determined by the *lex fori*, and not by the *lex loci contractus*, a matter not of right but of remedy,' though the validity of the assignment is determined by the place where it is made."

The Restatement, Conflict of Laws, page 705, is also cited. This again has to do only with the procedural question and states:

> "The law of the forum determines who may and who must sue and be sued."

A more pronounced "inadvertence" of counsel in failing to give us the true import of a statement of the law comes in the quotation (also on page 64) from 6 Corpus Juris Secundum. Counsels' quotation tells us that "it has been held" that the effect of an assignment is to be determined by the law of the forum—and stops. Actually, the quotation should have continued as follows:

> "but there is other authority to the effect that the effect of an assignment depends on the law of the place of assignment."

Because of the inadvertent character of appellants' brief, we have not attempted to make a detailed refutation of its statements. This is not to be taken as an admission by us that the statements are correct. We consider that much of what is said in the brief refutes itself. We have rather chosen to present appellee's position affirmatively and to point out the evidence and legal principles which support the trial court's judgment.

Conclusion.

The law of Germany applies to the substantive questions involved in this case. The evidence as to the law of Germany, uncontradicted for the most part, is: (a) the substantive facts relating to the transfer of the claim from May Film to Joe May did not amount to a valid transfer of the judgment against Universal under German law; (b) the declaratory judgment was not binding on Universal in any way and was not even evidence against it of any of the facts determined by it or recited in the case; (c) there was no transfer by operation of law or otherwise from the Bank For Foreign Commerce to Fritz Mandl; and (d) nothing similar to our concept of "equitable assignment" existed in German law.

Appellants' argument, based as it is on American law, is beside the point.

The trial court's findings of fact are supported by substantial evidence and the judgment based upon them should be affirmed.

Respectfully submitted,

LOEB AND LOEB,

By MILTON H. SCHWARTZ,

Attorneys for Appellee.

MILTON H. SCHWARTZ,
HERMAN F. SELVIN,
Of Counsel.

APPENDIX.

Cuba R. R. Co. v. Crosby, 222 U. S. 473, 478-9:

". . . But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. (Case.) The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. (Cases.) That and that alone is the foundation of their rights."

The Asiatic Prince (C. C. A. 2), 108 Fed. 287, 289-90:

"Whether or not it is the law and usage in Santos is a question of fact, the burden of proving which is on the party asserting its existence. The law of a foreign country and its commercial usages are proved here by calling its lawyers and merchants and interrogating them. That has been done in this case, with a result which certainly warrants the conclusion that the proof is overwhelmingly the one way. It is true that as to the law of Brazil the only witness called by claimant was a young lawyer, but his statements are direct, positive, and reiterated. * * * There was abundant opportunity to take the testimony of some other lawyer in the District Court, if the statements of claimant's witness were inaccurate, and to make application here to take further proofs, but libelant has contented himself with printing copious excerpts from

the statute law of Brazil, which he insists do not sustain the witness' statements. * * * Such a method of criticising the testimony of a foreign lawyer as to the law which prevails in his country is unpersuasive; there is much more than the text of a statutory enactment to be considered; departmental regulations, administrative construction, judicial exposition are often quite as important."

7 Wigmore on Evidence (3rd Ed.) 82, Sec. 1953:

"No doubt has ever been made that properly skilled testimony may be sought in proving the existence of a foreign rule of law in general. The question that involves the present principle (opinion testimony) is: When the text for a statute is before the court, may an aid be received in construing or interpreting it? No one doubts that the aid of a mere translator is proper. But when a translation, if necessary, has been made, is anything further allowable in the way of comment on the text?

"The answer has always and properly been that such aid may at any time be needed and may always be offered."